

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HERBERT HENDERSON,
Plaintiff,
v.
DR. HAILIE,
Defendant.

No. 2:21-cv-0790 WBS KJN P

FINDINGS & RECOMMENDATIONS

Plaintiff is a former state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. On February 21, 2023, defendant filed a motion for summary judgment and provided plaintiff notice of the requirements for opposing the motion from Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc). (ECF No. 33.) Previously, the court informed plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand, 154 F.3d at 957, and Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988). (ECF No. 31.) Plaintiff did not file an opposition.

On April 3, 2023, plaintiff was ordered to file an opposition or a statement of non-opposition to the pending motion within thirty days. In that same order, plaintiff was advised of the requirements for filing an opposition to the pending motion and that failure to oppose such a motion would be deemed as consent to have the: (a) pending motion granted; (b) action dismissed for lack of prosecution; and (c) action dismissed based on plaintiff's failure to comply with these

1 rules and a court order. Plaintiff was also informed that failure to file an opposition would result
2 in a recommendation that this action be dismissed pursuant to Rule 41(b) of the Federal Rules of
3 Civil Procedure.

4 The thirty day period expired, and plaintiff did not respond to the court's order.

5 "Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an
6 action for failure to comply with any order of the court." Ferdik v. Bonzelet, 963 F.2d 1258,
7 1260 (9th Cir. 1992). "In determining whether to dismiss a case for failure to comply with a
8 court order the district court must weigh five factors including: '(1) the public's interest in
9 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
10 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits;
11 and (5) the availability of less drastic alternatives.'" Ferdik, 963 F.2d at 1260-61 (quoting
12 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali v. Moran, 46
13 F.3d 52, 53 (9th Cir. 1995).

14 In determining to recommend that this action be dismissed, the court considered the five
15 factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly support dismissal of
16 this action. The action has been pending for two years and reached the stage, set by the court's
17 October 20, 2022 scheduling order, for resolution of dispositive motions and, if necessary,
18 preparation for pretrial conference and jury trial. (ECF No. 31.) Plaintiff's failure to comply with
19 the Local Rules and the court's April 3, 2023 order suggests that he abandoned this action and
20 that further time spent by the court thereon will consume scarce judicial resources in addressing
21 litigation which plaintiff demonstrates no intention to pursue.

22 Under the circumstances of this case, the third factor, prejudice to defendants from
23 plaintiff's failure to oppose the motion, also favors dismissal. Plaintiff's failure to oppose the
24 motion prevents defendants from addressing plaintiff's substantive opposition, and would delay
25 resolution of this action, thereby causing defendants to incur additional time and expense.


26 The fifth factor also favors dismissal. The court advised plaintiff of the requirements
27 under the Local Rules and granted ample additional time to oppose the pending motion, all to no
28 avail. The court finds no suitable alternative to dismissal of this action.

1 The fourth factor, public policy favoring disposition of cases on their merits, weighs
2 against dismissal of this action as a sanction. However, for the reasons set forth supra, the first,
3 second, third, and fifth factors strongly support dismissal. Under the circumstances of this case,
4 those factors outweigh the general public policy favoring disposition of cases on their merits. See
5 Ferdik, 963 F.2d at 1263.

6 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be
7 dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(b).

8 These findings and recommendations are submitted to the United States District Judge
9 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
10 after being served with these findings and recommendations, any party may file written
11 objections with the court and serve a copy on all parties. Such a document should be captioned
12 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
13 objections shall be filed and served within fourteen days after service of the objections. The
14 parties are advised that failure to file objections within the specified time may waive the right to
15 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16 Dated: May 11, 2023

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18 KENDALL J. NEWMAN
19 UNITED STATES MAGISTRATE JUDGE

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